STATE OF MINNESOTA
IN COURT OF APPEALS
A09-1218, A09-1228

Tyrone McKinley Plunkett, petitioner,
Appellant,

vs.

Erin Plunkett, n/k/a Erin Hunter,
Respondent.

Filed August 17, 2010
Affirmed
Hudson, Judge
Dissenting, Minge, Judge

Hennepin County District Court
File No. 27-FA-000211963

Tyrone McKinley Plunkett, Maple Grove, Minnesota (pro se appellant)

Erin Hunter, Brooklyn Park, Minnesota (pro se respondent)

Considered and decided by Minge, Presiding Judge; Hudson, Judge; and Muehlberg, Judge.*

U N P U B L I S H E D O P I N I O N

HUDSON, Judge

On appeal from the denial of his motion to reduce or terminate his child-support obligation, appellant argues that (1) the district court erred by dismissing his motion for

* Retired judge of the district court, serving as judge of the Minnesota Court of Appeals by appointment pursuant to Minn. Const. art. VI, § 10.

review of the order of the child-support magistrate (CSM); (2) the CSM overstated appellant's income by omitting his losses from self-employment; (3) the CSM abused her discretion by failing to consider additional evidence relating to the self-employment; (4) the record, including the erroneously excluded evidence, does not support the CSM's determination that there was no substantial change in circumstances, rendering appellant's existing support obligation unreasonable and unfair; (5) the CSM failed to adequately consider modifying the existing medical support order, based on appellant's dependent medical coverage; and (6) the CSM failed to address appellant's request for reimbursement of a prior overpayment of support. We affirm the district court's dismissal of the motion for review and affirm the CSM's order.

FACTS

The district court dissolved the marriage of appellant Tyrone Plunkett and respondent Erin Hunter by judgment in 1997. The judgment granted the parties shared legal custody of their three minor children, with respondent having sole physical custody and appellant ordered to pay child support to respondent. In 2001, a CSM ordered a downward modification of support, based on appellant's gross monthly income from unemployment compensation and his real-estate business. Respondent was ordered to maintain health coverage for the children through her employment, and appellant was ordered to contribute to the premium for that coverage.

In March 2009, appellant moved to modify or terminate support, alleging substantially decreased income based on losses from his real-estate business. He produced evidence showing that, for the past year, he had been employed by the State of

Minnesota as an information technologist, with a gross monthly income of $6,067. Appellant also sought retroactive reimbursement of support, arguing that one of the parties' minor children had been emancipated and was residing at a Job Corps location, rather than with respondent. Appellant also argued for a change in medical support, based on the fact that his new employment had available dependent health coverage.

The CSM denied the motion to modify support. The CSM found that appellant was currently employed full-time with the State of Minnesota and that he did not provide adequate financial information relating to his self-employment losses. Accordingly, the CSM did not consider appellant's self-employment losses in determining his gross income for child-support purposes. The CSM found that the application of the guidelines to the parties' incomes, with appellant's gross income determined as his salary from state employment, would result in a basic support obligation of $668. Because this amount was not $75 and 20% higher or lower than the existing support obligation, the existing support order was not rebuttably presumed unreasonable and unfair.

The CSM also declined to modify medical support. The CSM found that specific information on the appropriateness of appellant's dependent medical coverage was unknown, including its deductible and whether coverage existed for the child's providers. The CSM found that respondent had consistently maintained dependent coverage, which remained reasonable and in place, and that the parties should discuss the specifics of appellant's insurance coverage and its appropriateness.

Appellant filed a motion for review of the CSM's order with the district court. The district court dismissed the motion based on lack of jurisdiction, concluding that

appellant: (1) failed to timely file the motion for review, and (2) failed to timely file valid affidavits reflecting service on respondent or Hennepin County. Appellant took separate appeals from the CSM's order denying his motion to modify support and from the district court's order dismissing appellant's combined motion for review of the CSM's order. This court consolidated the appeals.

D E C I S I O N

I

Appellant challenges the district court's dismissal of his motion for review of the CSM's order denying his request to reduce his child-support obligation. A district court has jurisdiction to review a CSM's decision only if the party seeking review has properly filed with the court and served upon the other parties, including the county agency, a motion for review. *See* Minn. R. Gen. Pract. 376.02, 377.02. This court reviews de novo a district court's dismissal of a motion for review. *Brazinsky v. Brazinsky*, 610 N.W.2d 707, 710 (Minn. App. 2000).

A party seeking review must, within 20 days of service of notice of the CSM's decision, file the original motion with the court and serve the completed motion upon all parties, including the county agency. Minn. R. Gen. Pract. 377.02. Service may be made by mail or by personal service. *Id.* If a party files the motion by mail, "the motion shall be postmarked on or before the due date set forth in the notice of filing." *Id.* (c). The affidavit of service must be filed at the time the motion is filed. *Id*. (d).

Courts strictly construe a rule or statute that provides a specific period for filing and serving a motion for review. *Sanders v. Boughton*, 404 N.W.2d 916, 918 (Minn.

App. 1987). "If a notice [of review] is not served or filed within the specified time period the reviewing court lacks jurisdiction." *Id.* (citing *Blixt v. Civil Serv. Bd.*, 297 Minn. 504, 505, 210 N.W.2d 230, 231 (1973)); *cf. Maki v. Hansen*, 694 N.W.2d 78, 82 (Minn. App. 2005) (concluding that service of a motion for review was effective when the party seeking review served the other party with the motion, despite rules requiring that service shall be made by a neutral person on the opposing attorney, when the responding party was not prejudiced by the improper service).

The district court concluded that it lacked jurisdiction to conduct review because appellant: (1) failed to timely file a motion for review, and (2) failed to timely file an affidavit reflecting service on respondent or on Hennepin County through the office of the Hennepin County attorney. The record shows that appellant received a notice of filing of the CSM's order stating that, to preserve his right to review, he needed to file both the motion and proof of service of the motion by May 29, 2009. The record contains copies of envelopes, postmarked May 29, showing that the motion was deposited in the mail addressed to respondent, Hennepin County, and the district court on that date. Appellant has asserted that the person performing service for appellant was unable to locate a notary on May 29 and intended to have the affidavit of service notarized the next day. But the affidavit of service was not executed and sworn until June 24, 2009.

We agree with appellant that he timely filed the original motion for review by mail. The applicable rule provides that a motion for review may be filed by mail, postmarked by the specified date. Minn. R. Gen. Pract. 377.02(c). By depositing the

motion in the mail, postmarked May 29, 2009, appellant complied with that time requirement, and the district court erred by dismissing his motion on the ground that the original motion was not timely filed.

But we conclude that the district court did not err by dismissing the motion for review on the alternate ground that appellant did not timely file a proper affidavit reflecting service. For appellant to preserve his right to review, he needed to file a properly executed affidavit of service with the district court at the time he filed the motion. *See* Minn. R. Gen. Pract. 377.02(d). In order to constitute valid proof of service, that affidavit needed to be signed and sworn. *See* Minn. Stat. § 358.42(a) (2008) (stating that in taking acknowledgment, notarial officer determines from personal knowledge or satisfactory evidence that the person appearing before officer and making acknowledgment is the person whose true signature is on the instrument).

Appellant argues that he complied with the rule by filing an unsworn affidavit of service by mail on May 29 and filing a sworn affidavit later. But the affidavit of service did not become valid until it was notarized on June 24. This was nearly a month after the time requirement for filing a motion for review. *See Norton v. Hauge*, 47 Minn. 405, 406, 50 N.W. 368, 368 (1891) (stating that signature and official designation of officer with authority to administer oath or affirmation are essential to validity of affidavit). Because appellant did not timely file a valid affidavit of service, the district court did not err by dismissing appellant's motion for review.

II

Appellant challenges the CSM's decision denying his motion to modify support. The district court has broad discretion in determining whether to modify child support. *Gully v. Gully*, 599 N.W.2d 814, 820 (Minn. 1999). This court will reverse an order relating to child support only if we are convinced that the district court abused its discretion by resolving the matter in a manner "that is against the logic and the facts on the record." *Id.* (quotation omitted). On review of a CSM's order relating to child support, we apply the same standard of review as we would apply to an order of the district court. *Brazinsky*, 610 N.W.2d at 710.

The terms of a child-support order may be modified upon a showing of a substantial change in circumstances that makes the terms of the previous support order unreasonable and unfair. Minn. Stat. § 518A.39, subd. 2(a) (2008). The party seeking modification has the burden to show both that: (1) a substantial change occurred in one or more of several factors, including "substantially increased or decreased gross income of an obligor or obligee"; and (2) the substantial change renders the previous order unreasonable and unfair. *Id.*; *Hecker v. Hecker*, 568 N.W.2d 705, 709 (Minn. 1997). The terms of the existing order are rebuttably presumed unreasonable and unfair if the application of the child-support guidelines to the parties' current circumstances results in an order that is calculated as at least 20% and $75 higher or lower than the current support order. Minn. Stat. § 518A.39, subd. 2(b) (2008).

Self-employment losses

Appellant argues that the CSM erred by calculating his gross income for child-support purposes based only on his employment through the State of Minnesota without reference to his losses from self-employment. He argues that, because the CSM declined to consider evidence relating to those losses, the findings relating to his gross income were clearly erroneous. He asserts that if that evidence had been considered, it would show a substantial change in circumstances, making the previous order unreasonable and unfair.

Gross income for child-support purposes includes periodic payments received by an individual, such as salaries and wages. Minn. Stat. § 518A.29 (2008). It may also include self-employment income, as measured by gross receipts, minus the costs of any goods sold and ordinary and necessary business expenses. Minn. Stat. § 518A.30 (2008).

A party seeking to modify child support must file with the motion supporting documents, including a financial affidavit, which discloses all sources of gross income for the purpose of child-support calculation. Minn. Stat. § 518A.28(a) (2008). That affidavit "shall include relevant supporting documentation . . . including, but not limited to, pay stubs for the most recent three months, employer statements, or statements of receipts and expenses if self-employed." *Id*. If a party does not serve and file the affidavit and its supporting documentation, "the court shall set income for that parent based on credible evidence before the court." Minn. Stat. 518A.28(c) (2008). Absent permission from the CSM to submit evidence after a hearing, "[o]nly evidence that is

offered and received during the hearing . . . may be considered in rendering a decision." Minn. R. Gen. Pract. 364.10, subd. 2.

Appellant submitted with his motion a list of income and expenses, including loan payments presumably incurred in his real-estate business. At the hearing, he also introduced exhibits of: (1) his pay stubs from state employment, and (2) a list of current monthly income and expenses, including mortgage expenses for his rental properties. But appellant did not, either before or during the hearing, submit receipts or other documentation of his claimed expenses from self-employment. After the hearing, he attempted to submit additional expense documentation, including tax returns and financial statements, but the CSM informed him that the record had been closed.

The CSM found that, although respondent asserted substantial real estate losses, he did not furnish his 2008 personal or business tax returns and that he had only provided, in a timely manner, a summary of income and expenses. Because the CSM found that appellant had not established the income or losses from his business, she calculated his gross income for support purposes based only on his state employment.

Appellant argues that the CSM improperly failed to consider the additional evidence which he attempted to submit after the hearing. He asserts that, at the hearing, he felt he was "only . . . allowed to present" information that the CSM requested. But appellant had the burden to present specific evidence supporting his motion to modify support. *See Hecker*, 568 N.W.2d at 709. This included submitting financial documentation to support that motion in a timely manner. *See Spooner v. Spooner*, 410 N.W.2d 412, 413 (Minn. App. 1987) ("A party has a duty to supply financial information

in a proper fashion to the trial court."). The CSM did not abuse her discretion by declining to consider appellant's additional, late-submitted documentation of self-employment income and losses, and did not err by using only his income from state employment to calculate his gross income for child-support purposes. *See* Minn. Stat. § 518A.28(c). Based on that income, the CSM did not abuse her discretion by concluding that appellant failed to demonstrate a substantial change of circumstances, making his existing support obligation unreasonable and unfair. *See* Minn. Stat. § 518A.39, subd. 2(a).

Medical support

Appellant also challenges the CSM's order relating to medical support. This court reviews the terms of a medical-support order for abuse of discretion. *Casper v. Casper*, 593 N.W.2d 709, 714 (Minn. App. 1999). A support order may be modified if a change in appropriate health care coverage makes the terms of the previous support order unreasonable and unfair. Minn. Stat. § 518A.39, subd. 2(a)(6). If the parent who was previously ordered to provide health care coverage for a child no longer has coverage available to the child, it is presumed that a substantial change in circumstances has occurred, making the previous medical-support order unreasonable and unfair. Minn. Stat. § 518A.39, subd. 2(b)(3).

Appellant argues that the CSM abused her discretion by failing to modify the existing medical support order because he now has dependent medical coverage, and the CSM failed to consider that coverage or its appropriateness. *See* Minn. Stat. § 518A.41, subd. 3 (2008) (stating factors for determining appropriateness of health care coverage,

including comprehensiveness, accessibility, and affordability). Although the record contained appellant's pay stubs, which confirmed that appellant had available dependent coverage and its cost, appellant did not present further information relating to that coverage to the CSM. The CSM therefore did not clearly err by finding that the record lacked evidence on the specifics of appellant's coverage, including the amount of any deductible and whether the child's current medical providers would be covered. As the CSM noted, the child's current coverage through respondent was reasonable and had been in effect for a number of years, so that the terms of the previous medical-support order were not rebuttably presumed unreasonable and unfair. *See* Minn. Stat. § 518A.39, subd. 2(b)(3). We conclude that, on this record, the CSM did not abuse her discretion by failing to order a change in the medical-support order.

Appellant also alleges that respondent failed to follow the CSM's recommendation that she confer with appellant with respect to his dependent coverage. But we note the district court's finding that the parties' youngest child would turn 18 in March 2010 and was expected to graduate from high school in June 2010. Therefore, the issue of an ongoing medical-support order may now be moot. *See* Minn. Stat. § 518A.26, subd. 5 (2008) (defining "child" for support purposes as a person under 18, unless that person is under 20 and still attending secondary school or that person, due to physical or mental condition, is not capable of self-support).

Overpayment of support

Appellant argues that the CSM erred by failing to rule on his request for reimbursement due to overpayment of support for one of the parties' children. But

appellant failed to raise this argument when asked to identify contested issues at the hearing. Therefore, the CSM did not address it, and we need not consider it. *See Thiele v. Stich*, 425 N.W.2d 580, 582 (Minn. 1988) (stating that this court need not address issue not raised and decided by lower court). Even if we were to address appellant's argument, the result would not change. Respondent presented unrebutted evidence that the child had left her residence in December 2008 and returned in January 2009, that he returned from his Job Corps location to her home on weekends, and that she reported that information to the Hennepin County Support and Collections Office. Therefore, to the extent that the CSM implicitly denied appellant's request for reimbursement of support, she did not abuse her discretion by doing so.

Affirmed.

MINGE, Judge (dissenting)

I respectfully dissent. Appellant appeared pro se in a proceeding conducted by a child support magistrate (CSM). His request for modification of child support was based on significant rental losses he was experiencing due to the effect of the deteriorating real estate market. Appellant presented financial statements summarizing and detailing his losses. At the time of the hearing, neither respondent nor the CSM questioned or challenged the accuracy of appellant's losses. Appellant asserts that he brought other tax documents confirming the losses to the hearing. No one asked for additional documentation. Later that day, appellant asked the CSM to include his business income statements in the hearing record. The CSM refused to accept the proffered documents.

In denying any modification of child support, the CSM, the district court, and this court have faulted appellant for not producing actual receipts and timely introducing tax records. With respect to self-employment income, the statute only requires "statements of receipts and expenses." Minn. Stat. § 518A.28(a) (2008). The statute does not require filing underlying documentation where there is neither a challenge to nor a request for documentation. When appellant realized that additional records might be important to the magistrate, he promptly sent them.

I would conclude it is unnecessarily harsh and an abuse of discretion for the CSM to reject appellant's documents in considering his request for modification of child support. I would reverse denial of the child-support-modification request and remand

that issue for reconsideration based on a record that included appellant's proffered financial information.